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No. 98-1372

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

REBECCA J. BROWN, On Behalf of Herself
and All Other Persons Similarly Situated,
Petitioner,

v.

NATIONSBANK OF GEORGIA, N.A.
and JOHN LITZLER,
Respondents.

On Petition For Writ Of Certiorari To The
United States Court Of Appeals For The Fifth Circuit

PETITIONER'S REPLY BRIEF TO BRIEF IN OPPOSITION

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No. 98-1372

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

REBECCA J. BROWN, On Behalf of Herself and All Other Persons Similarly Situated, *Petitioner,*

v.

NATIONSBANK OF GEORGIA, N.A. and JOHN LITZLER, *Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONER'S REPLY BRIEF TO BRIEF IN OPPOSITION

In its brief in opposition, respondent NationsBank of Georgia, N.A. addresses the Questions Presented by grossly distorting the following facts and law in this case:

PETITIONER'S FACTS ARE NOT AT ISSUE

In plain language, there was no ERISA plan at the time of removal of this case to federal court. The review of this case should be based on Petitioner's Statement of Facts Material to Questions Presented. [Pet. 2] The averments of facts stated in Petitioner's Original Petition in state court and First Amended Complaint--Class Action in federal court are not at issue. These facts have not been denied by the respondents, who had the opportunity to answer, but did not file an answer as a responsive pleading. Under Rule 8(d) of the Federal Rules of Civil Procedure, averments in a pleading to which a responsive pleading is required are admitted when not

denied in the responsive pleading.

LAW OF JURISDICTIONAL ISSUES

In plain language, erroneous federal jurisdiction can never be waived. The Questions Presented are from lower court decisions 1)denying remand to state court, 2)denying ERISA relief, and 3)denying existence of an ERISA plan.

Subsidiary questions "fairly included" in the Questions Presented are 1)Whether the "relate to" tests for ERISA preemption can require denial of remand to state court without a covered plan? and 2)Whether ERISA preemption requires that ERISA relief be available?

The Questions Presented, and subsidiary questions fairly included, go directly to the issues of federal jurisdiction. Determining federal jurisdiction in the lower courts is a primary supervisory function of the Court. The prime responsibility for the Court is for the proper functioning of the federal judiciary, and the grant of certiorari in cases involving jurisdiction is part of that responsibility. For that reason alone the petition for writ of certiorari in this case should be granted. Such cases certainly qualify for review by reason of conflicts of decisions as exist in this case.

Whether or not raised below, jurisdictional issues are always considered for review, even *sua sponte*. See *United States v. Storer Broadcasting Co.*, 351 U.S. 193, 197 (1956). See also *Louisville & Nashville R. Co. v. Mottley*, 211 U.S. 149, 152 (1908); (". . . it is the duty of this [C]ourt to see to it that the jurisdiction of the [court of appeals and district court], which is defined and limited by statute, is not exceeded").

Interestingly, the court of appeals decision relied on a case citation about a jurisdictional issue regarding the "relate to" tests for preemption of state law, in *Sanson v. General Motors*, 966 F.2d 618 (11th Cir. 1992), *cert. denied*, 507 U.S. 984 (1993). Even more interesting, the dissenting opinion in *Sanson* by Judge Birch, at 623, uses the "sensible person" approach described below in finding no preemption because the state law creating Sanson's cause of action is not in a field of law with a judicially created specific remedy that

explicitly encompasses pension plans.

LAW OF ERISA-GOVERNED PLANS

The "relate to" tests for preemption of state law can only be applied to ERISA-governed plans that are ERISA covered plans. In *District of Columbia v. Greater Washington Bd. of Trade*, 506 U.S. 125 (1992), Justice Thomas delivered the opinion of the Court by stating first there must be a covered plan under ERISA §4(a) Coverage, 29 U.S.C. §1003(a) [Pet. App. 26a], before the "relate to" tests for preemption of state law can be applied, at 127. See also:

a. *Meredith v. Time Ins. Co.*, 980 F. 2d 352 (5th Cir. 1993); ("ERISA preemption is based on the existence vel non of an employee benefit plan, and that an employee benefit plan necessarily must center in the existence of an employer and an employee," at 354--Emphasis added).

b. *Concha v. London*, 62 F.3d 1493 (9th Cir. 1995); (if the plaintiff is not a participant [Brown was not a participant at time of removal], beneficiary or fiduciary, then [her] state law claims fall outside ERISA's sphere and are not subject to preemption, at 1505).

c. *Slamen v. Paul Revere Life Ins. Co.*, No. 98-6147 (11th Cir. Feb.1, 1999) <http://www.law.emory.edu/11circuit/feb99/98-6147.opn.html> ("because the plan is not governed by ERISA" the state law claims "did not arise under ERISA and the district court was without jurisdiction," at 4).

d. *Cypress Fairbanks Medical Center, Inc. v. Pan-American Life Ins. Co.*, No. 96-20850 (5th Cir. Apr. 17, 1999) <http://www.ca5.uscourts.gov/opinions/pub/96/96-20850-cv0.htm> (state law action, arising "precisely because there is no ERISA plan coverage," remanded to Texas state court, at 3--Emphasis added).

LAW OF THE FIRST AMENDED COMPLAINT

Nonetheless, once the district court accepts jurisdiction under ERISA preemption whether or not there is a covered plan, it is difficult to challenge that jurisdiction on appeal, in an interlocutory proceeding or otherwise, particularly when the district

court has focused on availability of equitable relief under ERISA and has not entered a final judgment on whether relief is available for a fiduciary breach cause of action. See *Concha v. London*, *supra* 3; (an order refusing to remand is, of course, not a final appealable order under 28 U.S.C. §1291, at 1506). Standards for interlocutory appeals under 28 U.S.C. §1292(b) are very exacting.

It was not only Brown's most appropriate course, but it was her required course, that she plead her state law claims under ERISA §502(a) Civil enforcement remedies and relief in her first amended complaint, pursuant to *Christopher v. Mobil Oil Corp.*, 950 F. 2d 1209 (5th Cir. 1992);(claimants should be required to plead preempted state law claims as ERISA claims, at 1223). See also:

a. Vega v. National Life Ins. Services, Inc., 145 F. 3d 673 (5th Cir. 1998); (motion to amend complaint to assert state law claims under ERISA implicitly granted by denying motion to remand, at Note 13).

b. *Slamen v. Paul Revere Life Ins. Co.*, *supra* 3; (district court "dismissed [plaintiff's] state law claims as preempted by ERISA, allowing [plaintiff] leave to amend for purpose of stating an ERISA claim," at 2--Emphasis added).

LAW OF FIELD PREEMPTION

However, Justice Scalia and Justice Ginsburg have noted most recently in *California Division of Labor Standards Enforcement et al. v. Dillingham Construction, N.A., Inc., et al.*, 519 U.S. 316 (1997), that the "relate to" tests for preemption set out in earlier decisions of the Court now simply appear to be wrong, at 334. The Justices suggest looking for the "sensible person" approach, where "relate to" is not a test for preemption, but rather should be used to identify ordinary field preemption, that is, the field of laws regulating "employee benefit plans" covered under ERISA §4(a) Coverage, 29 U.S.C. §1003(a). [Pet. App. 26a]

See also the similar conclusion in the dissent by Justice Stevens in *District of Columbia v. Greater Washington Bd. of Trade*, *supra* 3, at 136 ; (ERISA supersedes state law regulation in the field regulated by ERISA, and when state law at issue does not

regulate even one inch of the preempted field there is no preemption) and *John Hancock Mut. Life Ins. Co. v. Harris Trust and Sav. Bank*, 510 U.S. 86 (1993); ("we discern no solid basis for believing that Congress, when it designed ERISA, intended fundamentally to alter traditional [ordinary field] preemption analysis," at 99).

Fortunately, a few lower courts have expressed the same concerns. These courts can be considered the "sensible person" we should be looking for. They are deciding that the plain statutory language of ordinary preemption in ERISA §514(a), 29 U.S.C. § 1144(a) [Pet. App. 28a] is not sufficient for federal jurisdiction over state law claims seeking remedies or relief not within the scope of ERISA §502(a), 29 U.S.C. 1132(a) Civil enforcement remedies and relief [Pet. App.28a]. For example, see:

a. *Giles v. NYLCare Health Plans,* No, 97-20840 (5th Cir. Apr. 9, 1999) <http://www.ca5.uscourts.gov/opinions/pub/97/97-20840-CV0.HTM> (state law claims were remanded to state court, by deciding that ordinary field preemption under ERISA §514(a), 29 U.S.C. 1144(a) [Pet. App. 28a] is not sufficient for removal, unless state law claims seek the same relief as provided under ERISA §502(a), 29 U.S.C. 1132(a) Civil enforcement remedies and relief [Pet. App.28a], citing *McClelland v. Gronwaldt*, 155 F.3d 507 (5th Cir. 1998), at 3).

b. *Slamen v. Paul Revere Life Ins. Co., supra* 3; (if plaintiff "was not entitled to seek relief under ERISA, 'no federal jurisdiction exists' and the case must be remanded to the state courts," at 2).

c. *FMC Medical Plan v. Owens*,122 F. 3d 1258, 1260, 1262 (9th Cir. 1997); ("If . . .remedy sought [money damages] is not available under ERISA . . .the district court has no subject matter jurisdiction. . ."---remedy should be sought in state court, Note 2).

d. *Gabner v. Metropolitan Life Ins. Co.*, 938 F. Supp. 1295 (E.D. Tex. 1996); (removal to federal court is proper when relief is available under ERISA §502(a), 29 U.S.C. 1132(a) [Pet. App. 28a]).

e. *Constantine v. Minis*, 910 F. Supp. 657 (S.D.Ga. 1995);(there is no ERISA preemption because the state law fiduciary

breach claims do not fall within the scope of ERISA §502, 29 U.S.C. 1132 [Pet. App. 28a] even though the ESOP was a plan subject to ERISA, at 662).

f. *Harris v. Provident Life and Acc. Ins. Co.*, 26 F.3d 930 (9th Cir. 1994); ("it would be contradictory to rule that state law claims are preempted where the court has already held that the same plaintiffs may not assert a claim under ERISA because they are not 'participants' [e.g. Brown] in the ERISA plan," quoting *Deller v. Portland Gen. Elec. Co.*, 734 F.Supp, 916, 918 (D.OR. 1990), and "unlike the Chesire [sic] Cat, one cannot have the smile of preemption without the stripe of participation," quoting *Baird v. CSX Corp.*, 704 F.Supp. 100, 103 (W.D. Va. 1989), 934).

g. *Perry v. P*I*E Nationwide, Inc.*, 872 F. 2d 157 (6th Cir. 1989), *cert. denied*, 493 U.S. 1093 (1990); (state common law fraud in the inducement claims are not preempted because of absence of ERISA remedy, at 162).

LAW OF REMEDY OR RELIEF

Unfortunately, many lower court judicial decisions, as in the case at bar---that conflict with the above decisions---have resulted in no remedy or relief for a valid claim or cause of action. See *Hansen v. Continental Insurance Company*, 940 F. 2d 971, 979 (5th Cir. 1991) (citing *Lee v. E.I. Dupont de Nemours*, 894 F. 2d 755, 757 (5th Cir. 1990)).

***There is no jurisprudence in the world that accepts this kind of injustice*—except** in the many ERISA decisions where so many lower courts admittedly grin like the fabled "Cheshire Cat" in handing down such unjust decisions.

By definition, a "claim" or "cause of action"can not be a "claim" or "cause of action" without an available remedy or relief. See *Random House Legal Dictionary*, 1996, James E. Clapp; ("claim" means assertion of facts that if true would entitle claimant to judgment, p. 42; "cause of action" means facts that if true would entitle a party to relief in a lawsuit, p. 37; "remedy" means a judgment that can be issued by a court in a civil action---before merger of law and equity the conventional terminology was "a

remedy at law" or "relief in equity" but now the terms "remedy" and "relief" are largely interchangeable, p. 227).

The decision of the district court that "Brown's fraudulent inducement claim" is an ERISA "claim" [Pet. App. 24a] would mean to a "sensible person" that there is an ERISA remedy or relief for the claim.

Justice is the business of the Court. See *Story Parchment Co. v. Paterson Parchment Co.*, 282 U.S. 555 (1931); (it is a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts, at 563). See also *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984); ("It is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct," citing *Construction Workers v. Laburnum Corp.*, 347 U.S. 656, 663-664 (1954), at 251).

Justice can be served under *Caminetti v. United States*, 242 U.S. 470 (1917); ("the meaning of the statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, . . . the sole function of the courts is to enforce it according to its terms," at 485). Under plain statutory language, the Court can affirm as a judicial decision, that when there is no remedy or relief under ERISA for a state law claim, the claim is not under ERISA preemption, is not under federal jurisdiction, and is under state law. By this affirmation, the Court would eliminate erroneous federal jurisdiction in the lower courts, and eliminate lower court monstrous distortions, conflicts and injustices regarding available remedies and relief, including:

a. Characterizing equitable relief of restitution as applying only to ill-gotten gain and not to benefits deprived, as in the case at bar. [Pet. App. 10a-11a] But see *Varity Corp. v. Howe*, 516 U. S. 489, 116 S. Ct. 1065 (1996); (affirming restitution of benefits deprived) and *In Re Unisys Corp.*, 57 F. 3d 1255, 1269 (3rd Cir. 1995); (appropriate remedies for individual claims may include restitutionary reimbursement for unpaid benefits).

b. Characterizing, as the lower courts did in the case at bar, that ERISA provides only "appropriate equitable relief" and not monetary relief. [Pet. App.4a] The review of the case at bar

includes ERISA §502(a)(2), 29 U.S.C. §1132(a)(2) [Pet. App.28a], containing, *inter alia*, the words "appropriate relief," to be provided under ERISA §409(a), 29 U.S.C. §1109(a) [Pet. App. 27a] containing, *inter alia*, the words "remedial relief" combining "remedy at law " and "relief in equity." See *Random House Legal Dictionary, supra* 6. This language, then, would include monetary damages, monetary equitable relief and monetary remedial relief.

The monetary aspects of equitable relief have also been recognized in Supreme Court decisions. For example, see the concurring opinion by Justice Brennan in *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134 (1985); (monetary relief cannot be withheld simply because a beneficiary's remedies under ERISA are denominated "equitable," at Note 10). Monetary relief in *Russell* under ERISA §404(a), §409(a) and §502(a)(2), 29 U.S.C. §1104(a), §1109(a)and §1132(a)(2) [Pet. App. 27a-28a] is confirmed in *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993); (under *Russell*, fiduciaries are personally liable for damages, at 252).

CONCLUSION

Federal jurisdictional issues are important, and this case is representative of the numerous conflicting and erroneous lower court jurisdictional decisions that never see the appellate review of the Court. The respondent's inability to address the Questions Presented without grossly distorting the facts and law in the case makes the need for review of the action below indisputable, suggesting that summary reversal for remand to state court may be in order.

Respectfully submitted,

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